

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**HOLSUM BAKERY, INC./
EPI BREADS PHOENIX, L.L.C.**

Employer

and

Case 28-UC-229

**BAKERY, CONFECTIONARY, TOBACCO
WORKERS AND GRAIN MILLERS
INTERNATIONAL UNION, AFL-CIO, CLC,
and its LOCAL UNION NO. 232**

Petitioner

DECISION AND ORDER

In its petition, the Petitioner seeks to clarify an existing bargaining unit consisting of the production, sanitation, and shipping employees employed by Holsum Bakery, Inc., herein called Holsum, at its plant in Tempe, Arizona, herein called the Geneva plant. The Petitioner asserts that Holsum and Epi Breads Phoenix, L.L.C., herein called Epi, are either a single employer, joint employers, or alter egos, and, therefore, that the production, packaging, and shipping employees of Epi employed at the Geneva plant should be found to be part of the existing collective-bargaining unit and covered by the existing collective-bargaining agreement between the Petitioner and Holsum. Holsum and Epi assert that there is no single employer, joint employer, or alter ego relationship between Holsum and Epi. Holsum and Epi also contend that even if a single employer, joint employer, or alter ego relationship exists, the employees of Holsum and Epi lack a community of interest that would require the inclusion of the Epi employees in the existing collective-bargaining unit.

Based on the reasons set forth more fully below, I will dismiss the petition because the record in this matter fails to support a finding that Holsum and Epi are a single employer, joint employers, or alter egos inasmuch as Epi is a separate employing entity that shares little if any common management, control of labor relations, and integration of operations with Holsum.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. **Hearing and Procedures:** The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. **Jurisdiction:** Holsum is an Arizona corporation with a place of business in Tempe, Arizona, where it is engaged in business as an operator of bakeries. Epi is a limited liability corporation organized under the laws of the State of Delaware with an office and place of business in Tempe, Arizona, where it is engaged in business as an operator of a bakery. Lavo Corporation is a Georgia corporation with a place of business in Atlanta, Georgia, where it is engaged in business as an operator of bakeries. The parties have stipulated, the record shows, and I find, that during the 12 months preceding the hearing in this matter, Holsum, Epi, and Lavo Corporation, each derived gross revenues in excess of \$500,000 from their respective business operations, and during the same period each purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of Arizona. Holsum, Epi, and Lavo Corporation are each engaged in commerce within the meaning of the Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

3. **Unit Clarification Determination:**

A. **Background**

1. **Holsum**

Holsum operates three bakeries in the Phoenix metropolitan area, including the Geneva plant. At its Geneva plant, Holsum produces ready-to-eat buns. At its two other plants, located in Phoenix and Tolleson, Arizona, Holsum produces bread and buns for grocery stores and the fast food and food service industries. Holsum products are produced, wrapped, and labeled according to customers' needs, and have a shelf life of seven to ten days.

Since August 10, 1987, as set forth in the certification in Case 28-RC-4419, the Petitioner has been certified as the collective-bargaining representative of the following employees, herein called the Unit:

All full-time and regular part-time production, sanitation, and shipping employees employed at Holsum's bakery facility located at 710 West Geneva Drive, Tempe, Arizona; excluding all maintenance employees, office clerical employees, guards and supervisors as defined in the Act.

At that time of certification, the employees in the Unit were employed by Lucky Stores, Inc., a predecessor of Holsum. Holsum purchased the Geneva plant in 1996. The current collective-bargaining agreement between Holsum and the Petitioner is effective by its terms from August 22, 1999 to June 10, 2006 (the CBA).

There are currently approximately 63 employees employed by Holsum within the Unit. Unit job classifications are categorized within three divisions--production, shipping, and sanitation. Unit positions include dough mixer, over operator, leads, production break persons, divider operator, journeyman, relief person, wrapping machine operator, wrapping machine helper, checker-receiver, and sanitor.

Some, though not all, of Holsum's employees employed at its other facilities in the Phoenix metropolitan area are represented by labor organizations. Specifically, at its Phoenix facility, the distribution employees are represented by Teamsters Local 104 and the maintenance employees are represented by the Machinists Union. Holsum's employees employed at its Tolleson plant are not represented by a labor organization.

Ed Eisele owns all of the voting stock in Holsum, and he has sole authority to make corporate decisions for Holsum. Eisele, as an individual, is also the sole member of Ed-E LLC (Ed-E), an Arizona limited liability corporation organized in April 2000. Robert Gansel is Holsum's director of administrative services and corporate secretary. In June 2002, Gansel also became an officer of Ed-E (though Gansel is not a member of Ed-E). Gansel owns non-voting stock in Holsum. Gansel is also the corporate secretary of Epi, and is authorized to sign Epi checks.

2. Epi

On June 27, 2002, Epi was formed as a limited liability corporation under the laws of the State of Delaware. Its two members are Lavoie Corporation, herein called Lavoie, and Ed-E, the limited liability corporation controlled by Eisele, the controlling shareholder of Holsum. On the same date, Holsum, Ed-E, Lavoie, and Epi entered into a series of agreements under which Epi has and continues to operate. Epi is a joint venture between Ed-E and Lavoie, each controlling a 50 percent share of Epi.

Epi was created to produce and distribute "Epi Bread" products, including frozen parbaked French and Italian breads, in the Western United States. As discussed more fully below, in November 2002, Epi began production within the Geneva plant. Epi's product is shipped and marketed in a frozen condition and has a shelf life of approximately six months.

At the time of hearing, Epi employed approximately 28 employees, including employees in the following classifications: production lead, mixer operator, divider operator, extra mixer, make-up, oven operators, de-panner, packing, and shipping. There are approximately seven production and seven packaging/shipping employees working on each of the two shifts currently run by Epi.

3. Lavoie

Lavoie is a Georgia corporation. Its principal office and bakery is in Atlanta, Georgia, from where it does business in certain eastern states, including Georgia, under the name of Epi Breads. Lavoie owns the "Epi Breads" trademark and its recipes. Lavoie is investor-owned, and its president is Nic Mulliez. In early 2003, Gansel also became a director of Lavoie. He has attended one meeting of Lavoie's board, in February 2003. In Atlanta, Lavoie employs approximately 165 employees.

B. Epi's Structure and Operations

On June 27, 2002, Holsum, Ed-E, Lavoι, and Epi entered into a series of agreements which outline the relationship and operation of Epi. When the documents setting forth these agreements were executed, the parties understood that certain exhibits referenced in the documents could not yet be completed inasmuch as the operations were not yet up and running and all of the specifics concerning such matters as the particular type of equipment to be provided to Epi had not yet been finalized. The documents do, however, create the framework under which Epi has operated since it was created on June 27, 2002. These documents include the following:

1. Operating Agreement of Epi Breads Phoenix, L.L.C.

The operating agreement was entered into by and between Ed-E and Lavoι, Epi's initial members. The agreement establishes Epi, a limited liability corporation, in order to, "develop, distribute, and market parbake and frozen bakery products ... in the states of Arizona, New Mexico, Colorado, Utah, [parts of Nevada, and parts of California]." By its terms, the operating agreement expires on December 31, 2040. The operating agreement provides that each member of the limited liability corporation, i.e., Ed-E and Lavoι, will make initial capital contributions of \$100,000 in cash and also sets forth the terms of the distribution of net available cash flows and other profits from Epi to its members, Ed-E and Lavoι.

2. Equipment Lease Agreements

On June 27, 2002, the parties to the formation and operation of Epi also entered into two lease agreements. By these agreements, Ed-E and Lavoι each agreed, respectively, to lease certain equipment to Epi, for use in producing its parbake products, in exchange for a monthly lease payment. In essence, the parties agreed to assign to, or purchase fixed assets and lease them to, Epi in return for a monthly fee.

Specifically, Ed-E and Lavoι, the respective "lessors," described as being the "owner[s]" of and having "the authority to dispose of or lease the equipment" at issue, agreed to each lease to Epi equipment with a fair market value of \$1,200,000. In return, Epi, the "lessee," agreed to pay monthly rent for the equipment in the amount of \$14,286 to each lessor. The term of the leases is seven years, expiring in 2009. It is contemplated that during the term of the lease agreements, Ed-E and Lavoι will gradually be reimbursed for their respective investments.

The record contains documents which record and detail the equipment and assets that have been provided to Epi as of the date of hearing, pursuant to its equipment lease agreement with Ed-E and Lavoι. It is anticipated that once all of the equipment and assets are provided, there will be a settling among the parties so that the respective investments will be equal. It is also anticipated that as a result of the operation of these agreements, Holsum will break even while Ed-E and Lavoι will split the eventual profits from Epi.

3. The Services Agreements

On June 27, 2002, the parties involved in the formation of Epi entered into two services agreements: one between Holsum and Epi and the other between Lavoie and Epi. Both services agreements are effective by their terms until May 1, 2008. In essence, by these agreements, Holsum has agreed to provide Epi with space and utilities, as well as purchasing, receiving, maintenance, sanitation, and other services in exchange for an annual service fee. Other products provided by Holsum to Epi, including ingredients, raw materials, and packaging used by Epi, are not covered by the annual service fee paid by Epi to Holsum but represent additional items whose costs are charged to, and borne by, Epi. Lavoie's separate services agreement with Epi requires that Lavoie provide to Epi sales services, customer services, information system, and computer networking, as well as corporate accounting and other services. By a separate licensing agreement described more fully below, Lavoie also provides the "Epi Breads" trademark and license to Epi.

a. Services Agreement between Holsum and Epi

Under the Holsum-Epi services agreement, Holsum has agreed to provide services to Epi and Epi has agreed to pay Holsum service fees. Among the services provided by Holsum pursuant to this services agreement are:

- (a) ... [P]roduction support services reasonably required by [Epi], including, but not limited to, advice, guidance, and expertise from Holsum's senior Operations staff, access to Holsum's employee facilities, research and development resources, access to the [quality assurance] lab, maintenance facility, flour system, and yeast system.
- (b) ... [P]urchasing, logistics and material handling support as reasonably required by [Epi], including contract flour purchasing, other raw material purchasing, and receiving raw materials and daily transfer to [Epi] from Holsum's storage and provide employee services, maintenance and sanitation services necessary on equipment owned or leased to [Epi], sales and marketing support and other services as set forth on Exhibit A.
- (c) Provide [Epi] with any other assistance similar to (a) and (b) that [Epi] may reasonably require.

This services agreement also describes the compensation to be received by Holsum from Epi, under the heading of "Compensation for Services:"

for the first three years of this Agreement, Holsum will be compensated for the Services \$200,000 in year one, \$300,000 in year two, and \$400,000 in year three. After the end of year three, the parties shall either negotiate the covered services and compensation and payment terms of this Agreement or, if no agreement can be reached, terminate this Agreement.

Exhibit A to the Holsum-Epi services agreement, which is also Exhibit A to the Lavoie-Epi services agreement, enumerates the services that are to be provided by Holsum, Lavoie, and Epi, respectively. It also identifies which services and products are included as part of the services fee paid by Epi to Holsum; invoiced by Holsum to Epi; and billed directly to Epi. Exhibit A, as discussed further below, also includes those services fees that are paid by Lavoie.

In addition to those services and materials already identified above as being covered by the annual service fee paid by Epi to Holsum, Exhibit A shows that such services and materials as water, property insurance, and utilities are provided by Holsum and covered by the annual service fee.

The services and materials provided by Holsum that are charged to Epi, over and above those covered by the annual services fee, include such items as raw materials, packaging, and workers compensation insurance. For example, with regard to the ingredients used by Epi, which are purchased and received in bulk by Holsum, Epi is charged and pays for the amount of raw materials it uses in its production on a "cost plus 1%" basis. Packaging is invoiced to, and paid by, Epi in the same manner. Still other costs associated with production and shipping not covered by the service fee paid by Epi to Holsum are billed by vendors directly to Epi, including nitrogen for Epi's freezer, uniform services, packaging, and costs associated with pre-employment drug screening. The record shows that Holsum sends to Epi monthly invoices covering the monthly service and lease payments and other additional charges for such costs as ingredients, packaging, and workers compensation. Epi has, in fact, made such monthly payments to Holsum.

There have been isolated instances where a Holsum employee has performed limited services for Epi that were not contemplated by the services agreements. The parties have reached an understanding whereby such instances are not invoiced to Epi unless there is a concrete cost associated, described as "incremental costs," such as overtime wages.

Although Exhibit A of the services agreements indicates that Holsum will provide "plant manager" services, in practice this is not the case. While the manager of Holsum's Geneva plant, James Kwan, has oversight responsibilities for the entire plant in areas of security and plant-wide safety requirement, Epi's plant operations are managed independently. Lavoie employs Epi's plant manager, Cleunice Vieira, who is responsible for the operation of Epi.

Epi uses approximately 20% of the space in the Geneva plant for its processes. The Geneva plant is owned by a landlord, whose office is in California and who leases it to Holsum. There is currently no actual lease or sublease involving Epi covering the portion of the Geneva plant used by Epi, other than as set forth in the terms of the services agreement between Holsum and Epi. Holsum is not charging Epi a separate rent for the use of that part of the property being used by Epi. Rather, "rent" is identified as being covered by the services fee paid to Holsum pursuant to the services agreement. The rent paid by Holsum to the landlord has not increased because of the presence of Epi. The services agreement between Holsum and Epi contemplates that there will be a sublease which would allow Epi to continue to rent and operate in the portion of the Geneva plant designated for its use in the event that Ed-E ceases being part of the joint venture. At the time of the hearing, the agreement on the sublease, which requires the approval

of the owner of the building, had not been completed. It is anticipated that the parties to the sublease covering the Epi space will be the owner of the building, Holsum, and Lavoï.

b. Services Agreement between Lavoï and Epi

Under the Lavoï-Epi services agreement, Lavoï agrees to provides services to Epi and Epi agrees to pays Lavoï compensation. Specifically, under this agreement, Lavoï is obligated to:

- (a) Provide sales and marketing support services, corporate accounting support services, including accounts receivable, accounts payable, financial reporting and banking services, travel services, information services, equipment leasing services, and freight and logistics services all as reasonably required by [Epi].
- (b) Provide customer service as reasonably required by [Epi] and other services as set forth in Exhibit A.
- (c) Provide [Epi] with any other assistance similar to (a) and (b) that [Epi] may reasonably require.

This services agreement, under the heading of “Compensation for Services,” provides that, “Lavoï and [Epi] agree that Lavoï will receive no compensation for the [services required by this Agreement], except for the sales services.” Exhibit A to the Holsum-Epi and Lavoï-Epi services agreements provides that sales will be the responsibility of a Lavoï employee, and that Epi will pay Lavoï the costs associated with the sales function.

4. License Agreement Between Lavoï and Epi

A license agreement was also entered into between Lavoï and Epi. Under this agreement, Epi is licensed to use the “Epi Breads” marks and Epi Breads formulae (i.e., recipes) for use within the territory described in the other documents referenced above (all or part of six Western States, including Arizona). Epi is not required to pay license fees to Lavoï for the use of the Epi Breads trademark or formulae (unless at some time Ed-E obtains Lavoï’s interest in Epi and requires Lavoï to comply with a non-compete agreement, at which time a percentage of Epi’s net sales will be paid to Lavoï). The Epi Bread trade names and recipes are part of what Lavoï “brought to the table” as part of the deal that resulted in the formation of Epi.

C. Holsum’s and Epi’s Respective Operations

The record contains a significant amount of detailed evidence examining the differences between and similarities of the production and packaging systems used by Holsum and Epi. The record shows that Holsum and Epi, in broad terms, run similar commercial baking operations. The major distinction between the two is that Epi uses a nitrogen freezer and refrigerated trucks in its operation, while Holsum does not. The basic equipment used by each of the operations, with the exception of Epi’s nitrogen freezer, is, with minor variations, essentially similar commercial bakery equipment. Such equipment includes mixers, dividers, proofers, and ovens.

Notwithstanding their essential similarities, some general distinctions between the processes are apparent. Specifically, Holsum's process is more automated in nature than Epi's. Holsum's process produces and ships ready-to-eat bakery goods, while Epi produces and ships frozen bread products. The record shows that Epi's process requires its employees to manipulate the product with their hands during the production process; Holsum's employees do not routinely do so. Nonetheless, the record establishes that the basic skills necessary to work on the Epi line are essentially similar to the skills utilized by Holsum Unit employees.

While the record shows that the Holsum and Epi production processes are essentially similar, the record also establishes that Holsum's and Epi's operations are not integrated, except in terms of the delivery of certain ingredients, such as flour and water, to their respective equipment. As discussed in greater detail below, Holsum's and Epi's operations run along side one another within the Geneva plant, but do so separately, using separate equipment, recipes, employees, management, policies, and supervision.

1. Physical Plant

The Geneva plant is basically a one-story facility containing production, packaging, shipping, and receiving areas, and docks, offices, and other amenities such as restrooms and a breakroom. There is a second-story area over that part of the facility which is used for Epi offices and a training room used by both Holsum and Epi employees. Part of the area now being used by Epi had been a Holsum conference room. Walls exist between some, though not all, of the Holsum and Epi areas of the plant. There is a floor to ceiling wall between the Holsum and Epi loading areas. There is one boiler room that runs water for the entire building. Epi and Holsum employees share restrooms, the lunchroom (break room), vending machines, parking lots, a bulletin board for legal notices, and hairnet dispensers. Holsum and Epi employees are allowed to, and do, use the break room at the same time. In order to use the restrooms and lunchrooms, Epi employees must travel through the Holsum side of the plant.

Holsum and Epi employees use different locker rooms to change into their uniforms. The Holsum locker rooms are on the first floor. The Holsum employee lockers for personal belongings are in the restrooms, while there is another Holsum locker room, separate from the restrooms, which Holsum employees use to change into and out of their uniforms. Epi's employee lockers are in the second floor area located over Epi's packaging room. There are separate designated employee entrances for Holsum and Epi employees; however, these entrances are not marked as such. In practice, employees may enter through either entrance. The Holsum employees' time clock is near the Holsum employee entrance, while the Epi time clock is near the entrance considered the Epi employee entrance. For a short time at the beginning of production and start up, until early-January 2003, Epi employees used Holsum's time clock.

Construction and alterations to the physical plant were necessary to prepare for Epi's presence in the Geneva plant. Such construction included installing or modifying drains, converting and moving an existing cooler to be a freezer, and some modifying of a dock area. This work was done within the basic framework of the various lease and other agreements, whereby Holsum would spend money on leasehold improvements and Lavoie would spend money

on particular equipment necessary to produce the Epi Breads products. These expenditures would go toward the requisite initial investment of \$1.2 million by each party as contemplated by the parties' equipment lease agreements. Certain specific costs of construction were actually paid for through invoices to Holsum and Lavoie.

2. Ingredients

Both Holsum and Epi utilize similar production processes common to commercial bakeries. These processes employ the use of equipment such as mixers, dividers, proofers, and ovens. Holsum and Epi also utilize many of the same ingredients. Pursuant to the services agreements, Holsum orders, procures, and arranges for the delivery of all ingredients used by both Holsum and Epi and is compensated for doing so. The three main ingredients used by both Holsum and Epi are flour, water, and gluten. These products are stored together at the Geneva facility.

Flour is the principal ingredient used by both Holsum and Epi. Flour is brought to the Geneva facility by rail and stored in two shared silos. Flour is delivered by pipes to the mixing areas used by Holsum and Epi, respectively, by means of a vacuum blowing system. The amount of flour used by each mixer is measured by meters near the mixers. Chilled water is also delivered by pipes to both Holsum and Epi mixers. Gluten is used by both Holsum and Epi but is not stored separately.

An inventory system records the amount of these ingredients used by Holsum and Epi, respectively. Holsum charges Epi, by way of a monthly invoice, for the cost of ingredients Epi uses. The amount of ingredients used by Epi and Holsum are calculated based on the amounts of actual product each produces, minus waste. Holsum and Epi each record and submit their information, on a daily basis, to Holsum's production clerk. To do so, Epi submits a report to Holsum setting forth the number and type of mixes run by Epi during a particular day. Based on the formulae used during a particular day, the type and amount of ingredients used by Epi may be determined. This information is recorded and stored by personnel at Holsum's Phoenix facility and is entered into Holsum's inventory software called "MMA." Epi does not have access to the MMA system.

Ingredients, other than the major ingredients discussed above, are stored in the dry storage area. Holsum receiver employees unload and store ingredients that are to be used by either Holsum or Epi, or both. Ingredients stored in the dry storage area include gluten, calcium, and peroxide. There is a dry storage rack for Holsum and a dry storage rack for Epi. Care is taken to store Epi's ingredients apart from Holsum ingredients within the dry storage rack area. When Holsum and Epi employees go to the dry storage area to retrieve their respective ingredients, they use separate scales to weigh such materials. In addition to the common dry ingredients used by both Epi and Holsum, Epi's formulae require the use of other ingredients not used by Holsum such as special dough conditioners and dry sugar.

3. Management and Supervision

Holsum's and Epi's respective management teams are different and distinct. Epi's operations and production manager, Vieira, has day-to-day responsibility for managing Epi. Vieira is actually on Lavoï's payroll. Vieira reports to Denys Guon, Lavoï's operations manager, who is located in Atlanta. Epi's only other supervisor is Top Sokhom, who is classified as Epi's shift manager. Sokhom transferred to Epi from Lavoï in Georgia and is paid by Epi. Vieira and Sokhom hold weekly management conference calls with Lavoï. Holsum does not participate in these calls. Vieira operates distinctly and independently from Holsum's management.

Holsum is managed by several directors, including Gansel; Holsum's director of administrative services; Bob Hans, Holsum's director of associate services; and Hugh Coker, Holsum's director of operations. Holsum's operations at the Geneva plant are managed by James Kwan, Holsum's plant group leader. As plant group leader, Kwan is Holsum's highest management official stationed at the plant. Kwan reports to Coker, Holsum's director of operations.

The record reflects that just as Vieira has no supervisory authority over Holsum employees, Kwan has no supervisory authority over Epi's employees. Kwan supervises Holsum's employees with the assistance of three production team leaders, an engineering team leader, the chief engineer, and the sanitarian. Kwan and his supervisory staff are not involved in the hiring, firing, or discipline of Epi employees. Kwan and the other Holsum supervisors have not disciplined or recommended discipline of Epi employees.

a. Personnel Policies

The benefits paid to Epi employees and the personnel policies under which Epi employees work are controlled and administered by Epi and Lavoï. Vieira and Lavoï human resources director Margaret Bode are responsible for Epi personnel policies, not Holsum.

Vieira is responsible for all hiring, firing, and discipline at Epi. No one from Holsum is involved in determining the discipline issued to Epi employees. Vieira schedules and trains Epi employees. Vieira also conducts weekly employee meetings for Epi employees. No Holsum employees attend these meetings. Vieira does not attend Holsum employee meetings.

Epi determines which personnel policies will be implemented for Epi employees and how such policies will be applied. These benefits are distinct and administered separately from benefits paid to Holsum employees. For example, Epi employees are eligible for a stock ownership plan which provides ownership of Lavoï stock, not Epi stock. Epi's policies in the areas of overtime, benefit eligibility, holidays, health insurance, vacation, pay, seniority, shift differentials, bonuses, grievances, and other areas are distinct and separate from those of Holsum Unit employees.

Lavoï Human Resources Director Bode provides human resources guidance to Vieira and other support to Epi. Bode's reports to Nic Mulliez, Lavoï's president. Bode contracted for the

medical and dental plans for Epi's employees and also changed Lavoie's annual leave policy before implementing it among Epi employees. Vieira consults with Bode on such matters as separations and terminations. Vieira is responsible for Epi's hiring and establishing Epi's job classifications. Epi's employees' personnel files are maintained in Vieira's office.

Holsum employees have a Holsum logo on their uniforms, while Epi employees have a different logo. Both uniforms are white. Holsum employees wear short sleeve uniforms, while Epi employees wear long sleeve uniforms.

b. Human Resources Support Pursuant to Services Agreements

The human resource support services provided by Holsum to Epi pursuant to the services agreement are clerical and administrative in nature. Hans, Holsum's director of associate services, who has responsibility for Holsum's human resources functions, has no authority to resolve issues involving Epi employees. While Hans has discussed personnel issues with Epi's managers, and offered suggestions regarding the creation of Epi personnel policies, it has been on an informal basis. While Holsum provides Epi with human resources and administrative support pursuant to the services agreements, Epi retains full responsibility and control.

The actual support provided by Holsum to Epi in the area of human resources are not management functions. Such assistance, usually performed by Holsum by human resources representative Ludy Tamayo, includes placing employment advertisements when requested to do so by Vieira, screening applicants, arranging appointments for applicants selected by Vieira for interview, and performing other administrative duties relating to applicant pre-screening, drug testing, payroll, and immigration status. The record shows that such assistance is provided as required by the services agreements and is clerical and administrative in nature. Epi, not Holsum, makes the hiring decisions.

Tamayo also conducts parts of the orientation services and benefits presentations provided to Epi employees. These orientation sessions and benefits presentations are also provided pursuant to the services agreements and, again, are merely administrative, support services. These sessions are conducted for Epi employees and are not attended by Holsum employees. Some of Tamayo's contact with Epi employees, including the contact described above, is performed because of her ability to communicate with Epi applicants and employees who speak only Spanish. For example, Tamayo acted as a translator for Epi employees when they were offered "lock-out/tag-out" training in December 2002.

4. Production and Packaging Operations

The record shows that Epi and Holsum operate essentially similar commercial baking operations with some variations in terms of equipment and procedures. These operations are not integrated to any significant degree.

a. Holsum's Production and Packaging Operations

Holsum operates 3 shifts, 24 hours per day, except when operations are stopped on Friday afternoons to provide time for cleaning. At the Geneva plant, Holsum produces hot dog and hamburger buns that have a shelf life of seven to ten days. Holsum produces between 40 and 80 packages of product per minute, depending on the type of product being produced.

From start to finish, Holsum's production process takes approximately five hours. This process starts when the mixer employee inputs the appropriate recipe by using a touch screen computer. The ingredients are then automatically drawn into the sponge set and fermentation tanks. Such ingredients include flour, water, regular yeast, salt, and sugar. After the product, described at this point as a "sponge," sits for approximately three hours, it flows into the mixer where other ingredients, as required by the formula for the particular product being made, are added. After approximately 15 minutes of mixing, the product becomes "dough." The dough is moved to a dough pump, where it is pumped over to a divider in the make-up area. The employee who operates the mixer also operates the pump.

Another Holsum employee operates the divider, the equipment that divides the dough automatically. The dough balls are divided into separate pieces which will become buns. After being sent through rounding bars, these pieces of dough become more uniformly rounded. From this stage, the product moves to the intermediate proofer, where the dough is relaxed. After the dough is ready, and while still in the make-up area, it is moved to a sheeting roller. Another employee is responsible for operation of this machinery, which is called a Pan-O-Mat. From here, the product leaves the make-up area and is moved in pans onto a conveyor, where the dough is moved through a series of conveyors, including a bun shaker.

The next stop in the process occurs at the spiral proof box, a very large proof box where the dough sits, allowing it to rise, for approximately 47 minutes. From the proof box, the product is again moved on a conveyor to Holsum's spiral oven, where it is baked for approximately eight minutes. The oven operator sets the timer which controls the baking period. Through this point in Holsum's production process, only approximately four employees are involved. Ideally, there is no need for a Holsum employee to touch the product as it moves through the production area. In instances where the equipment is not operating properly or when it is jammed, Holsum employees may have a need to touch the actual product. After the product leaves the oven, it travels on the conveyor to the de-panner. The pans go back to the make-up area while the buns proceed into the spiral cooler, which involves a process that takes approximately 15 to 20 minutes. One employee oversees the oven and de-panning areas.

Holsum's packaging process is automated as well. Once the bun is cooled, the product is moved to the wrapping area where one of two machines slices the buns, puts the buns into bags, and then ties the bags. After this process, an employee takes the packages and places them on plastic trays which in turn are placed on dollies. There are seven Holsum employees in the wrapping area. Two employees transport the dollies from the wrapping area to the dock. These same two employees work in the shipping area. Holsum product is never shipped together with Epi product on the same trucks. Most of Holsum's products are shipped on reusable plastic

trays. A small number of Holsum products are placed on pallets and wrapped with shrink wrap. Holsum shrink-wraps pallets once every two to three weeks.

Unlike Epi, Holsum does use a freezer in its production process. Holsum's freezer is used by Holsum on occasions when the storage of product is necessary in anticipation of increased demand for products at certain holidays. At the beginning of Epi's production, Epi used Holsum's freezer on a temporary basis until the permanent Epi freezer was completed. Holsum uses a cooler to store yeast. Epi does not have the need to, and does not use a cooler, since its yeast is active dry yeast which does not require refrigeration.

Some customers of baking products require that a bakery provide proof of its cleanliness scores given by the American Institute of Baking (AIB). The most recent AIB audit conducted at Holsum did not include an inspection or scoring of the Epi area of the plant. Epi also needs to undergo AIB inspections, and anticipates that such will occur in the near future.

b. Epi's Production and Packaging Processes

Epi operates on a 2-shift, 5-day schedule. The basic processes used by Epi are similar, and in some cases identical, to those used by Holsum; however, parts of Epi's production are different from the process used by Holsum. For example, the mixers used by Holsum and Epi are different. Holsum's mixer uses a sponge system, while Epi's does not. Epi uses a nitrogen blast freezer as an integral part of its production process, while Holsum does not. Unlike Holsum's process, which starts with a sponge process, Epi's starts with the mixing of dough. After the dough is mixed, it proceeds to a divider. Epi uses the divider to weigh and divide its dough, while Holsum also uses the divider to shape the product. Epi employees routinely handle the dough at this point of the process, while Holsum employees do not.

After being run through the divider, the dough is allowed to rest, after which it is then cut and pre-molded. After being pre-molded, the dough is molded into balls by Epi's Boule machine, after which an Epi employee will complete the molding process by hand. From this stage, the dough is then placed into a proofer box--a Pan-O-Mat. Epi employees also use their hands during this process. The proofing process takes approximately one and a half hours. The product is then baked in the oven, but only to between 55 percent and 95 percent of completeness. The degree of completion depends on the particular customer's specifications. The oven operator, based on his observations and the existing humidity, may adjust the oven humidity and temperatures accordingly. The ovens used by Holsum and Epi are of a different type. Holsum's ovens are natural gas ovens powered by electricity. There is no need to adjust the humidity level while baking Holsum products. Unlike Holsum's ovens, Epi's ovens provide for the insertion of steam and the adjustment of the degree of humidity in the oven environment. While there are multiple amounts and sizes of mixes required in producing the various Holsum formulae, Epi produces one uniform size per mix.

After being baked, the product is then de-panned and moved to the nitrogen tunnel blast freezer where it is frozen. After being frozen, the product is packaged according to customer specifications. Epi's products are shipped by common carrier. They are packaged in plastic bags or cartons, placed on skids, and shrink-wrapped. On the other hand, for the most part,

Holsum's products are placed in polypropylene bags, placed in returnable baskets, and shipped to its customers by Ruan Transportation. The one customer that Epi and Holsum have in common is Fry's, a grocery store chain. While Holsum's products destined for Fry's first go to Holsum's distribution center, Epi's products sold to Fry's are delivered directly from Epi to Fry's.

5. Other Services Provided to Epi Pursuant to the Service and Other Agreements

Under the services agreements, Holsum provides sanitation services to Epi. Holsum sanitation employees, the only Unit employees who perform work for the benefit of Epi, clean the machines and equipment used throughout the Geneva plant, including equipment used by Epi. Holsum employs 10 sanitation employees who are covered by the Geneva plant CBA.

Epi's operations manager, Vieira, has arranged with Holsum's sanitation chief the schedule by which sanitation services are provided to equipment used by Epi. Normally, the sanitors clean equipment two to three times per week, usually when the operators of such equipment are not present. On occasions where sanitation services are required in addition to routine servicing, Vieira may contact sanitation staff directly and request their assistance.

Holsum also operates a maintenance shop. Maintenance employees repair the machines and equipment used in the production, wrapping and shipping processes throughout both the Holsum and Epi areas of the building. Maintenance services are provided to Epi pursuant to the services agreements with Holsum. Maintenance employees are not part of the Unit and are not covered by the CBA. The services agreements provide that Holsum will pay for labor hours necessary to maintain the equipment used by Epi, while Epi will pay for repair parts. If equipment being used by Epi requires maintenance, Vieira contacts the Holsum maintenance staff directly. Vieira talks with Holsum sanitation and maintenance employees. Epi employees do not routinely talk with such Holsum employees.

6. Equipment

Pursuant to the various service and other agreements described above, Holsum and Lavoie have both provided equipment that is being used by Epi. Epi's temporary mixer is located on the Holsum side of the plant. At the time of the hearing, the installation of, and preparation for, Epi's permanent mixer was 75 percent complete. Before the presence of Epi, Holsum used what is now Epi's temporary mixer a couple of times per year, as needed, as a back-up mixer. In addition, prior to the year 2000, this mixer was used by Holsum for the production of pizza dough for one of its customers. Holsum no longer produces pizza dough at the Geneva plant. Once the permanent mixer is fully installed, the temporary mixer will revert to Holsum, which will use it as needed as a back-up mixer.

Some of the equipment purchased by Lavoie for Epi includes a proof box, ovens, and a Mecatherm which is used in the make-up line that forms the dough pieces. The Mecatherm is not the type of equipment used in Holsum's production.

The equipment owned by Holsum but which is provided to Epi pursuant to the equipment lease agreement is covered under Holsum's property insurance coverage. Such equipment includes the mixer, divider, an intermediate ("overhead") proofer, and conveyor system. This equipment, before being designated as Epi equipment under the parties' equipment leasing agreement, was, at times, used by Holsum Unit employees. Some of the equipment provided by Lavoie is not covered by Holsum's insurance.

Some equipment and parts of the conveyor system currently being used within Epi's operation were used when the Unit employees produced pizza dough for one of Holsum's customers.

Pursuant to the services and other agreements, Holsum pays for labor hours necessary to maintain the equipment used by Epi, while Epi pays for repair parts. It is anticipated that once fully operational, capital equipment used by Epi will be purchased by Epi.

7. Collective-Bargaining History

There is no collective-bargaining history involving Epi employees. The record reflects that before the filing of the petition in this matter, Epi and the Petitioner engaged in discussions concerning the representation of the Epi employees. The conduct of these discussions shows that there is an absence of centralized control of labor relations. From the beginning of discussions which resulted in the formation of Epi on June 27, 2002, Holsum and Lavoie contemplated that Epi's labor relations would be distinct from that of Holsum's. Moreover, such discussions show that it was Mulliez of Lavoie, not Holsum, that was directing the labor relations of Epi.

Specifically, the record shows that before the Epi documents were signed in June 2002, Gansel and Mulliez asked Hans, Holsum's chief labor negotiator, to explore the feasibility of a separate agreement for Epi employees, assuming that the Petitioner obtained a majority of votes in a representation election, which would include different (lower) wages and no bumping or bidding between Holsum and Epi. Hans' first contacts with the Petitioner regarding Epi, which were of a preliminary nature, were in approximately February 2002. From the beginning of these discussions, Hans told the Petitioner that Epi was contemplated as a separate company from Holsum.

Beginning in April or May 2002, Eric Anderson became the Petitioner's representative in discussions with Hans regarding Epi. During the meetings held between Anderson and Hans, Hans made it clear that before any collective-bargaining agreement regarding Epi could be reached, the Petitioner would have to establish its majority status among the Epi employees by means of a Board election. During these discussions, Hans told the Petitioner that he was negotiating on behalf of Epi.

In September 2002, at the third meeting between Hans and Anderson regarding Epi, Mulliez made a presentation regarding the Epi production and packaging processes. Mulliez told the Petitioner that Epi wanted to use Lavoie's Atlanta wage scale for Epi employees, which is lower than the wage scale set forth in the (Holsum) CBA.

The Petitioner's position throughout the discussions, which lasted until the hearing in this matter, was that the Epi employees should be included under the current CBA as part of the Unit and that any agreements on different terms for Epi employees should be addressed in an addendum to the existing CBA.

D. Legal Analysis and Determination

The Petitioner asserts that Holsum and Epi comprise either a single employer, are joint employers, or are alter egos, and, therefore, that the production, packaging, and shipping employees of Epi employed at the Geneva plant should be found to be part of the existing Unit and covered by the parties' CBA. Holsum and Epi assert that there is no single employer, joint employer, or alter ego relationship between Holsum and Epi. Based on the record before me, I find that Holsum and Epi are not a single employer, joint employers, or alter egos and will, therefore, dismiss the petition.

The record supports a finding that Holsum and Epi are not a single employer or single employing entity. The term "single employer" applies to situations where apparently separate entities operate as an integrated enterprise in such a way that "for all purposes, there is in fact only a single employer." *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3rd Cir. 1982). An examination of the following factors is necessary in determining single employer status: common ownership and financial control; common management; the functional interrelation of operations; and centralized control of labor relations. *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965); *Dow Chemical Company*, 326 NLRB 288 (1998); *Denart Coal Co.*, 315 NLRB 850 (1995).

The most critical of these elements is centralized control over labor relations. Common ownership, while normally necessary to support a single employer finding, is not determinative in the absence of such a centralized policy. *Grass Valley Grocery Outlet*, 332 NLRB 1449, 1450 (2000). Single employer status ultimately depends on "all the circumstances of the case" and may be characterized as an absence of an "arm's length relationship found among integrated companies." *Denart Coal Co.*, supra; *Silver Court Nursing*, 313 NLRB 1141 (1994); *Dow Chemical Company*, supra.

In applying these criteria to the facts to the record evidence, I conclude that Holsum and Epi do not operate as a single integrated enterprise. Moreover, based on the record before me, I find that the creation of Epi as an employing entity in its own right appears to be the result of a legitimate arms-length transaction. First, with regard to common ownership, the record shows that there is a degree of common ownership between Epi and Holsum. Ed-E, one of the two members of Epi, the limited liability corporation, is controlled by Eisele, who also owns all voting shares in Holsum. There is no doubt that both Epi and Holsum, because of the ownership interest in each entity possessed by Eisele, share a degree of common ownership.

Notwithstanding the degree of common ownership described above, the record fails to show that Eisele, Gansel, or Holsum, possess or exercise any degree of financial control beyond that which is described in the various operating and services agreements and leases by which Epi was created and operates. To the contrary, the record shows that Epi's finances are independent

of Ed-E, Holsum, and Lavoï. Specifically, Eisele, through Ed-E, does not own a controlling interest in Epi. His ownership is limited to a 50 percent membership in Epi, the limited liability corporation. The record fails to show that such agreements reflect anything other than “arms length” transactions. The various operating, services, and lease agreements are the result of significant negotiations between the parties involved. The record fails to show that these various agreements, and the establishment of Epi, are a sham. The manner in which Epi was created, while offering financial benefits to Holsum, Epi, and Lavoï, also satisfies Lavoï’s interest in expanding operations and sales of its trademarked “Epi Breads” products into the Western States.

Turning next to common management, I find, based on the record before me, that there is very little, if any, common management between Holsum and Epi, and with the exception of Gansel, there is no common management among Holsum, Ed-E, and Epi. Holsum’s operations at the Geneva plant are managed by Holsum personnel, while Epi’s operation is managed by Epi and Lavoï personnel. The record shows that the production, shipping, and sales functions of Holsum and Epi, respectively, are not subject to common management, and that while Kwan is responsible for Holsum’s production and operation at the Geneva plant, it is Vieira that has the equivalent role regarding Epi. They manage the two entities separately. The human resources support provided to Epi by Holsum under the services agreements are administrative and clerical in nature. Epi retains all management authority in such areas and exercises such authority independently of Holsum. Epi retains full responsibility and control in such areas. When Vieira requires management expertise in the areas of human resources and personnel, she turns to Bode of Lavoï, not Holsum.

With regard to the third factor, functional interrelation of operations, I find that there is only limited functional interrelation between the operations of Holsum and Epi at the Geneva plant. The record establishes that, other than the services provided pursuant to the services agreements, Epi operates independently of Holsum. The actual production, packaging, and shipping operations of Holsum and Epi are separate. Epi operates within a distinct area of the Geneva plant, which although along side of Holsum, is separate from Holsum’s production. Each entity has its own production, packaging, and shipping lines, equipment, and employees.

The areas of operation where there is a degree of interrelation include the procurement and storage of ingredients (including receiving functions), the provision of maintenance and sanitation services and utilities, and provision of administrative support related to certain personnel functions. The respective duties and responsibilities of Holsum and Epi in these areas are delineated and controlled by the terms of the service and other agreements. Under the services agreements, Holsum is remunerated, either as part of the services fee or by additional payments, for the services, support, and products provided to Epi. However, I am of the view that the degree of interrelation of the operations reflected by the various services provided by Holsum to Epi pursuant to the service and other agreements does not support a finding that a single employer relationship exists.

Finally, I find that there is a distinct lack of centralized control of labor relations presented in this case. In reaching this conclusion I rely on the record evidence which establishes that there are distinct lines of supervision between Holsum and Epi; Holsum has no responsibility or authority in the areas of the discipline of Epi employees; Holsum and Epi have

distinct personnel policies; Epi's personnel policies are modeled on those of Lavoie, not Holsum; and that the benefits and pay offered to Epi employees are determined by Epi and Lavoie, not Holsum.

In sum, I find that the relationship between Holsum and Epi is not that of a single employer inasmuch as they do not comprise a "single-integrated enterprise." The record demonstrates that Epi is the result of an "arms length relationship ... among unintegrated companies," i.e., Holsum and Lavoie. *Grass Valley Grocery Outlet*, supra, 332 NLRB at 1450, citing *Operating Engineers Local 627 v. NLRB*, 518 F.2d 1040, 1045-1046 (D.C. Cir. 1975), *affd. on this issue sub nom. South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976).

Rather than establishing that a single-employer relationship exists between Holsum and Epi, the record shows that Epi is a joint venture established and operating as a distinct employing entity and is an employer, in its own right, within the meaning of the Act. The operating and other agreements upon which Epi operates reflect that Epi is an independent entity. The actual control over Epi's production, management, sales, supervision, and operation is possessed by Epi and, to a degree, Lavoie, but not Holsum.

The Board, in *East Kentucky Paving*, 293 NLRB 1132, 1134-1135 (1989), adopted the administrative law judge's analysis of whether a joint venture was in and of itself a new employing entity within the meaning of the Act. The administrative law judge found, relying on the Board's decisions in *Woodworkers Local 5-265 (Willamette Lumber)*, 107 NLRB 1141 (1954), and *Grove-Hendrickson*, 109 NLRB 209 (1954), that the joint venture in *East Kentucky Paving* was not a separate entity and employer within the meaning of the Act because, beyond describing itself as a joint venture, little else supported a finding that it was in fact a separate entity. There was no written agreement setting forth the terms of the joint venture; the joint venture did not conduct its operation as an entity separate from the venture partners; and it lacked the indicia of a distinct employing entity found by the Board in *Willamette Lumber*, supra, and *Grove-Hendrickson*, supra. In contrast, the joint ventures in *Willamette Lumber* and *Grove-Hendrickson*, like Epi in the instant case, were the product of written agreements. In *Woodworkers Local 5-265 (Willamette Lumber)*, the joint venture maintained a separate bank account, books, and records, was registered as an employer for tax purposes and state employee compensation plans, and met its payroll from its own funds. In *Grove-Hendrickson*, the joint venture maintained a separate bank account, separate books of account, and separate withholding and social security tax accounts, selected its own foreman, and gave him the sole authority to hire and fire those employees under his supervision.

Applying the criteria set forth in *Willamette Lumber* and *Grove-Hendrickson*, I find that the record in the instant case supports a finding that Epi is a separate employing entity and an employer, in its own right, within the meaning of the Act. As discussed infra, Epi, the joint venture, is the product of an arms length agreement between Holsum and Lavoie. Epi has bank accounts separate from Holsum, keeps its own books and records, has its own tax identification number, and meets its payroll from its own funds. Moreover, the record does not support a finding that Epi was created as, or has been operated as, a sham to avoid Holsum's obligations under the Act. For instance, before it began operations, Epi approached the Petitioner to discuss

issues related to potential representation of Epi employees. Throughout such discussions, both Holsum and Epi maintained the position that Epi, although a joint venture between Ed-E and Lavoie, would operate as an independent employing entity.

The Petitioner, at hearing, also took the position that Holsum and Epi constitute a joint employer. I find that they do not. Unlike “single employer” status, a finding of “joint employer” status does not depend on the existence of a single integrated enterprise. Therefore, the four-factor single employer summary is not applicable in a determination of joint employer status. Rather, as summarized in *NLRB v. Browning-Ferris Industries*, 691 F.2d supra at 1122,

a finding that companies are ‘joint employers’ assumes in the first instance that companies are ‘what they appear to be’ -- independent legal entities that have merely ‘historically chosen to handle jointly ... important aspects of their employer-employee relationship.’ *Checker Cab Co. v. NLRB*, 367 F.2d 692, 698 (6th Cir. 1966).

The existence of a joint employer relationship is essentially a factual issue that depends on the control that one employer exercises over the labor relations of another employer. *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000); *M.K. Parker Transport*, 332 NLRB 547, 548 (2000).

I find that the record before me does not support a finding that Holsum and Epi are joint employers. In reaching this conclusion, I rely primarily on the facts establishing that Epi controls the terms and conditions of employment of its employees; Holsum’s involvement in such matters are merely administrative and are provided pursuant to the terms of the service and other agreements; and that Holsum possesses and exerts virtually no control over Epi’s employees. The record shows that it is Epi, not Holsum, that determines the wage rates, benefits, hours, and training of the Epi employees. Vieira, Epi’s manager, turns to Lavoie management for controlling guidance in labor and employment issues. While Holsum has established general safety rules covering all persons who work or enter the Geneva facility, the maintenance of such plant-wide rules does not establish that Holsum shares or codetermines with Epi the matters governing essential terms and conditions of employment. See *M.B. Sturgis*, supra, 331 NLRB at 1301 (to find joint employer status, “the employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction”).

The Petitioner also contends that Holsum and Epi are alter egos and are both bound to the Holsum CBA. Contrary to the assertion by the Petitioner, I find that Holsum and Epi are not alter egos. “Alter ego” is most often analyzed in an unfair labor practice context involving situations in which the Board finds that what are asserted to be two separate employers are in fact and law one employer which may not be honoring a bargaining obligation. The Board does, however, also consider alter ego status in representation proceedings. *Elec-Comm, Inc.*, 298 NLRB 705 (1990). Two enterprises are found to be alter egos where they “have ‘substantially identical’ management, business purpose, operation, equipment, customers and supervision as well as ownership.” *Denzil S. Alkire*, 259 NLRB 1323, 1324 (1982), citing *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Advance Electric*, 268 NLRB 1001, 1002 (1984). An alter ego analysis is related, but separate from, a single employer analysis. *Johnstown Corp.*, 322 NLRB 818 (1997). Applying the alter ego criteria to the instant case, I find that Holsum and Epi are not

alter egos. In so finding, I rely on the record as a whole, and in particular those parts of the record discussed above that show that Holsum and Epi do not have substantially identical management, supervision, or ownership.

Based on my findings that Epi is a separate employing entity and that Holsum and Epi are not a single employer, a joint employer, or alter egos, I find that further proceedings on this petition are not warranted. Accordingly, I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition in the above matter be, and the same hereby is, dismissed.

REQUEST FOR REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, National Labor Relations Board, 1009 14th Street NW, Washington, DC, 20570. The Board in Washington must receive this request by June 27, 2003. A copy of the request should also be served on the undersigned at the Phoenix Regional Office.

Dated at Phoenix, Arizona, this 13th of June 2003.

/s/Cornele A. Overstreet

Cornele A. Overstreet, Regional Director

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